REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-4247

DOUGLAS K. FREEMAN

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board's denial of extraschedular referral was premature in light of its TDIU remand.

The Secretary unconvincingly argues that Mr. Freeman's case is distinguishable from *Brambley v. Principi*, 17 Vet.App. 20 (2003). He asserts that *Brambley* is inapposite to this case because there the Board remanded TDIU for "additional development of evidence as it pertained to unemployability[,]" but here the Board remanded TDIU to allow the RO to adjudicate the issue in the first instance. Sec. Br. at 11. The Board found that the Veteran's reports of his PTSD symptomatology during his June 2009 examination, in his March 2010 notice of disagreement, in his December 2012 substantive appeal, and during his January 2012 examination raised the issue of entitlement to TDIU because he experienced difficulty working, leading to his ultimate termination, and he had not worked for an extended period of time. R-20. Thus, it remanded TDIU for additional development and ordered that "the AOJ *must* adjudicate the issue of entitlement to TDIU." *Id.* (emphasis added).

This presents the same kind of "divergent positions concerning the completeness of the record" criticized in *Brambley*, and the Secretary misconstrues the nature of the error identified in that case. *See* 17 Vet.App. at 24; *cf.* Sec. Br at 10-11. Contrary to the Secretary's assertion, the error here mirrors that in *Brambley* because the Board found the record sufficient to decide the issue of extraschedular referral, while at the same time it found that development of the Veteran's complete disability

picture with respect to employability was necessary before the Board "must" adjudicate Mr. Freeman's entitlement to TDIU. R-17-20. The Board did not state that the AOJ *may* decide to develop and adjudicate entitlement to TDIU, but instead required such adjudication. R-20. The ordered development will likely assist the Board in understanding the Veteran's complete disability picture and how his service-connected disabilities, including his PTSD, affect his employment. Thus, the potential development the Board's remand discussed implicates the Veteran's PTSD and its severity. *Id.* The Board erred by adopting divergent views within its decision, and such error is not harmless as Mr. Freeman may have been entitled to increased compensation but for the Board's error. Remand is required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

II. The Board's listing of evidence did not provide adequate reasons or bases for its decision.

The Secretary failed to address Mr. Freeman's argument that the Board's reasons or bases were inadequate for its determination of the appropriate rating since January 2012. *See* Apa. Open Br. at 16-18; *see generally* Sec. Br. Thus, the Court may assume he concedes this point. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Where the Secretary fails to respond to an argument, "the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded").

In determining the Veteran's appropriate rating prior to January 2012, the Board uncritically adopted the VA examiner's opinion. *See* R-14. It dismissed evidence of symptoms associated with the 50 percent criteria because it determined that the VA examiner considered those symptoms and concluded there was not a higher degree of impairment. *See id.* The Board thus erred, as it was prohibited from outsourcing its adjudicative duties to a medical examiner. *See Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). The Secretary asserts that the Board did not outsource its analysis because it discussed the examiner's conclusions and the Veteran's symptoms and "weighed the evidence and found the examiner's opinion particularly probative, while simultaneously analyzing the symptoms noted." Sec. Br. at 10. However, the Board adopted the VA examiner's opinion *without* providing an analysis of its own. *See for example* R-14 (the Board acknowledged the Veteran's lay statements but found that "the Veteran's social impairment was addressed by the June 2009 VA examiner[,]" and while there was evidence of suicidal ideation, "the June 2009 examiner specifically noted" this evidence but "did not endorse a higher degree of . . . impairment").

Further, the Secretary misinterprets Mr. Freeman's argument regarding the appropriate effective date for an increased rating by arguing that the Veteran "concedes" the Board "discussed" evidence of worsening symptomatology although "it was not in the portion he deems 'the actual analysis.'" Sec. Br. at 8-9. He unpersuasively avers that that the Board's reasons or bases were adequate because

"[w]hen read as a whole, the Board's explanation for its decision as to the time when the facts show worsening of his symptoms" inform the Veteran of the reasons for the Board's decision. *Id.* at 9.

Mr. Freeman conceded in his opening brief that the Board "listed the evidence of record[.]" Open Br. at 13. Providing a list of evidence contained in the record does *not* equate to an adequate "discuss[ion]" that adequately informs the Veteran of the Board's reasons or bases for its decision. *Cf.* Sec. Br. at 8; *see Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992) (merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases). While the Secretary relies on *Johnson v. Shinseki* to assert that the Board was not required to discuss evidence in a certain section of its decision, the Court held in that case that the Board provided adequate reasons or bases for its decision where it discussed relevant evidence in its general listing of the evidence and *also* "in its analysis section" addressing the relevant issue. *See* 26 Vet.App. 237, 247 (2013) (en banc), reversed on other grounds by *Johnson v. McDonald*, 762 F.3d 1362 (2014). Because the Board did not provide an analysis of the lay evidence of the Veteran's worsening symptoms prior to January 2012 outside of the section it reserved for its analysis, but instead only generally listed the evidence of record, the Secretary's argument is misguided. *Cf.* Sec Br. 8-9; *see* R-12-13. Remand is required for the Board to initially analyze the lay evidence of record and reconsider the Veteran's entitlement to an increased rating and appropriate effective date.

III. The Board's failure to consider an earlier effective date for the Veteran's increased rating rested on a misinterpretation of law.

The Board reasoned that January 18, 2012, was the appropriate effective date for the 50 percent rating because the January 2012 VA examination noted the Veteran's symptoms that approximated the increased rating criteria. *See* R-15-16. The Secretary attempts to distinguish this case from *McGrath v. Gober,* 14 Vet.App. 28, 35 (2000), because "the Board did not find that the date of the creation of the January 2012 medical opinion was controlling[,]" although he provides no support for this bare assertion. Sec. Br. at 5. However, the Board found "the relevant evidence of record consisted of a January 2012 VA PTSD examination report." R-15. The Board assigned the effective date for the Veteran's increased rating in concert with the date of the examination. R-15-17. Accordingly, the Board *did* find the date of the examination to be controlling. Under *McGrath*, the Board was required to determine when Mr. Freeman's PTSD manifested itself at a severity approximating a 50 percent rating based upon all of the evidence. *See* 14 Vet.App. at 35 (a statement regarding prior conditions may support an effective date prior to the date of the statement). The Secretary, like the Board, fails to consider the retrospective nature of the 2012 examination.

During Mr. Freeman's examination, the examiner specifically recognized that multiple symptoms were "recurrent[,]" indicating that the Veteran had *previously experienced* this level of severity. R-374. Because the January 2012 examiner's opinion

was based on Mr. Freeman's retrospective reports of his ongoing symptoms, it is clear that his symptoms did not suddenly worsen during his examination. *See McGrath*, 14 Vet.App. at 35. Nothing in the examiner's report suggests that the Veteran's symptoms suddenly worsened around the date of the examination. *See* R-370-76; *see* 38 C.F.R. § 4.1 (2015) (when evaluating a disability, it is "essential [. . .] that each disability be viewed in relation to its history").

The Secretary responds that the Board did not err because there was "no statement by the 2012 examiner which indicated that the worsening of [the Veteran's] PTSD symptoms began at an ascertainable [sic] time prior thereto[,]" and the "[u]se of the word recurrent is not probative of the degree of disability resulting from those symptoms." Sec. Br. at 5. Thus, he asserts that "there are no facts contained in the 2012 medical opinion which dictate a different date of worsening than the Board found based on the facts contained in the record." *Id.* at 5-6.

On the contrary, in *McGrath*, the Court held that a review of the evidence supported an earlier effective date based on the Veteran's symptomatology even though no examiner indicated that the veteran's condition existed at that ascertainable time period. *See* 14 Vet.App. at 29-36. Therefore, the Court remanded the issue of determining an effective date for the Board to consider the facts found in light of the entirety of the record. *See id.* at 35-36. The Board here similarly failed to consider whether the severity of the Veteran's symptomatology reported in the January 2012 examination warranted an increased evaluation prior to the date of reporting in light

of its retrospective nature. This is especially prejudicial in light of the other evidence of record approximating in increased rating before the 2012 VA examination. For example, prior to the January 2012 examination, the Veteran reported below-average energy and a history of suicidal ideation. R-258; R-262. A 2010 mental health treatment plan note discussed the Veteran's avoidance of crowds, situations, or places due to fear, as he was uncomfortable around people. *Id.*; R-169. This resulted in an excessive reluctance to go out in public. R-169. It was the task of the Board, *not* the examiner, to consider the appropriate, ascertainable effective date for the Veteran's increased rating.

By nature of its determination that a 50 percent rating from January 2012 forward was warranted, the Board implicitly found that these symptoms demonstrated "the particular symptoms associated with that percentage [50], or others of similar severity, frequency, and duration." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). However, because the Board provided no further analysis other than to state a rating in excess of 50 percent was not warranted prior to January 2012, it is unclear if the Board considered whether the symptoms discussed in the examination, which it determined warranted an increased rating, began prior to the examination. Such consideration is essential to preventing prejudice to the Veteran's claim because it may cause the Board to determine that the Veteran should be entitled to an increased rating effective from an earlier date. *See McGrath*, 14 Vet.App. at 35. At the very least, the Board's discussion of the proper effective date for the increased rating

lacks adequate reasons or bases and frustrates judicial review. *See Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001); *see also Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board's statement of the reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court").

CONCLUSION

The Board erred when it misinterpreted the law and failed to consider whether the Veteran was entitled to an earlier effective date for his increased rating for PTSD. The Board further erred when it failed to consider whether the severity of the Veteran's symptoms warranted an increased rating as of January 2012 and when it prematurely denied entitlement to extraschedular referral.

Based on the foregoing reasons, as well as the arguments contained in the Veteran's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the issue of Mr. Freeman's entitlement to an increased rating for PTSD in accordance with the Court's opinion.

Respectfully Submitted,
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